



6712-01

FEDERAL COMMUNICATIONS COMMISSION

[GC Docket No. 10-44; DA 11-1950]

Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Record-Based Decisionmaking

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks comment on procedures to improve transparency and efficiency in Commission proceedings. In particular, the Public Notice seeks comment on whether the Commission should require commenters to file materials they cite in pleadings submitted in rulemaking proceedings, so that those materials are more easily accessible to all interested parties.

DATES: Comments may be filed on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], and reply comments may be filed on or before [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by GC Docket No. 10-44, by any of the following methods:

- Federal Communications Commission's Web Site: <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.
- Mail: See the SUPPLEMENTARY INFORMATION section of this document.

- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information, see the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: For further information regarding this proceeding, contact Elizabeth Lyle, Office of General Counsel, (202) 418-1720.

SUPPLEMENTARY INFORMATION: This is a summary of a Public Notice released by the Office of General Counsel on November 29, 2011. The full text of this document is available for public inspection and copying during regular business hours in the Commission's Reference Information Center, Portals II, 445 12th Street SW., Room CY-A257, Washington, DC 20554.

The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Room CY-B402, Washington, DC 20554, telephone (202) 488-5300, facsimile (202) 488-5563 or via email FCC@BCPIWEB.com. The full text may also be downloaded at <http://www.fcc.gov>.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

Documents will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The Commission has designated this proceeding as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules. 47 CFR 1.1200 et seq.; Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization, Notice of Proposed Rulemaking, 25 FCC Rcd 2430, 2439-40 (2010).

Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with § 1.1206(b) of the Commission’s rules. In proceedings governed by § 1.49(f) of the Commission’s rules or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the

electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

Summary of Public Notice

This Public Notice seeks comment on additional procedures to improve transparency and efficiency in Commission proceedings. In particular, the Public Notice seeks comment on whether the Commission should require commenters to file materials they cite in pleadings submitted in rulemaking proceedings, so that those materials are more easily accessible to all interested parties. The Commission bases its decisions on record evidence, properly disclosed, with the least possible burden on filers, and strives to tailor its procedures to those ends.

Transparency, robust public participation, and informed decision-making are key values that the Commission and its staff strive to uphold in all proceedings. In some proceedings, particularly large and complicated rulemakings, staff may analyze materials that parties have not submitted in the record, including materials such as state statutes, academic articles, blog posts, and company financial reports. This material may or may not contribute to the Commission's final decision, and seeking comment specifically on all the sources viewed by staff would greatly enlarge the record and tax the time and resources of the Commission and parties, with potentially little benefit.

In an effort to balance these considerations, staff has submitted collections of materials into the record of at least two major proceedings. In the Preserving the Open Internet proceeding, staff added the full text of various sources, including FCC working papers, transcripts from FCC workshops, comments submitted in other Commission rulemaking proceedings, public financial filings, academic literature, news articles, blog posts, corporate and non-profit research reports,

material from industry participants' websites, and investment firm conference call transcripts.

See Letter from Carol Simpson, Deputy Chief, Competition Policy Division, Wireline Competition Bureau, FCC, to Marlene S. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (Dec. 13, 2010); Letter from Carol Simpson, Deputy Chief, Competition Policy Division, Wireline Competition Bureau, FCC, to Marlene S. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (Dec. 10, 2010). In the Connect America Fund proceeding, staff added citations to similar materials, including material from other federal and state government entities, books, and data already released by the Commission or the Universal Service Administrative Company. See Letter from Jennifer Prime, Legal Counsel, Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (Oct. 19, 2011); Letter from Jennifer Prime, Legal Counsel, Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (Oct. 17, 2011); Letter from Jennifer Prime, Legal Counsel, Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 et al. (Oct. 7, 2011). Materials also included such things as state statutes, pleadings and decisions from state administrative proceedings, and data and reports available on the Commission's website. In many instances, filings that the Commission staff placed in the record had been cited by commenters in their filings, and the staff's submission was intended to make the materials more accessible. In both proceedings, however, a small number of commenters voiced concern that such submissions, toward the end of the proceeding, might not serve their intended purpose of promoting transparent decision-making and might, indeed, limit opportunities for meaningful responsive comment. See, e.g., Letter from Todd D. Daubert & J. Isaac Himowitz, Counsel for SoutherinLINC Wireless and the Universal Service for America Coalition, to Chairman Genachowski, WC Docket No. 10-90 et

al., at 3 (Oct. 21, 2011); Letter from David A. LaFuria, Counsel to Allied Wireless Communications Corp. et al., WC Docket No. 10-90 et al. (Oct. 20, 2011); see also Preserving the Open Internet, Broadband Industry Practices, Report and Order, 25 FCC Rcd 17905, 18049-50 (2010) (dissenting Stmt. of Cmmr. McDowell), recon. and pets. for review pending.

In light of these developments, the Public Notice seeks comment on filing requirements that may improve transparency and informed decision-making in future rulemaking proceedings. In particular, the Public Notice seeks comment on requiring parties to submit full copies of any materials cited in their pleadings or ex parte submissions. Such a requirement may be viable under the Commission's current electronic filing processes, when it would not previously have been feasible. Further, it could help to ensure that the record timely and unambiguously includes those materials that parties to our proceedings believe to be germane and informative. In the context of formal complaint proceedings, the Commission's rules already require parties to provide "all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies." See 47 CFR 1.721(f).

What would be the benefits and burdens of such a new procedural requirement in rulemaking proceedings? Should any such rule distinguish among types of documents cited? For example, should data be treated differently from other forms of information and should economic analysis be treated differently from a law review article, court decision, or other government publication? Should ease of access to the cited information matter? If so, how should ease of access be determined? Are there some circumstances in which materials could not practically be placed in the record, such as when third parties do not permit copying (e.g., daily newsletters), the material is very bulky, or the material is in the form of a database? Would parties need to place an entire

document in the record or would an excerpt suffice? Should the inclusion of an Internet address (URL) where the document can be viewed be deemed sufficient to satisfy the filing requirement for that document? Might this proposal diminish the quality of the comments received by the Commission, for instance if the additional burden of providing supporting materials outweighs their perceived value to the commenter? Would this proposal impose an undue paperwork burden on filers? Should the proposal be adopted in additional, or different, categories of proceedings?

FEDERAL COMMUNICATIONS COMMISSION

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